No. 20,811

In the United States Court of Appeals for the Ninth Circuit

JACK GOODMAN, PARAMOUNT ICE CREAM CORP. AND FRIGID PROCESS CO., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

On Appeal from the Order of the United States District Court for the Southern District of California

BRIEF FOR THE APPELLEES

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JURISDICTION

As hereinafter more fully brought out, the order denying appellants' motion to suppress in this case is not appealable, and, consequently, this Court is without jurisdiction.

QUESTIONS PRESENTED

1. Whether an order denying a motion to suppress evidence is appealable.

2. Whether appellants' constitutional rights were violated when they voluntarily gave corporate and personal records to agents of the Internal Revenue Service.

3. Whether the District Court erred in failing to enforce appellants' subpoenas requiring the production of internal reports, memoranda, and manuals of the Internal Revenue Service.

STATUTE AND RULE INVOLVED

28 U.S.C.:

> Sec. 1291 [as amended by Sec. 48, Act of October 31, 1951, c. 655, 65 Stat. 710, and Sec. 12(e), Act of July 7, 1958, P.L. 85-508, 72 Stat. 339]. *Final decisions of district courts.*
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Federal Rules of Criminal Procedure:

> Rule 41. *Search and Seizure*
>
> * * * *
>
> (e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the war-

rant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

Since appellants contend that the District Court's findings of fact are clearly erroneous (Br. 25-42), we shall here summarize those findings and the relevant evidence, and shall also state the procedural history of the case.

1. The procedural history

On November 8, 1965, appellants (Jack Goodman and two corporations, Paramount Ice Cream Corporation and Frigid Process Company) filed a complaint in the District Court below against the United States, the United States Attorney, and various officers of the Internal Revenue Service, now appellees, alleging that various documents, copies and property owned by

appellants had been "unlawfully and illegally seized and taken" by appellees Nielsen, Stutz, and Loebig and praying that everything taken (including copies), be returned, that any evidence obtained directly or indirectly from the seized material be suppressed "as evidence against them in any criminal proceeding in this judicial district," and that the United States Attorney be forever enjoined from seeking an indictment based upon any of the allegedly seized material. (I-A R. 3-5.)[1] The complaint alleged that the action arose under the Fourth, Fifth, and Sixth Amendments to the Constitution and under Rule 41(e) of the Federal Rules of Criminal Procedure. (I-A R. 3.) The complaint was accompanied by, *inter alia*, the affidavits of appellant Goodman (I-A R. 38-43) and of Ruth Myshrall, office manager of Paramount (I-A R. 33-34), and of Evelyn Gedatus, office manager of Frigid (I-A R. 36-37).

Appellees filed an opposition to the complaint entitled "Defendants' Points and Authorities" (I-A R. 70-86), supported by, *inter alia*, affidavits of appellees Nielsen (I-A R. 89-96), Stutz (I-A R. 103), and Loebig (I-A R. 104). The first document just referred to (I-A R. 70-86) asserted (1) that the complaint should be dismissed for lack of jurisdiction (I-A R. 70-72) and (2) that, in any event, none of appellants' constitutional rights were violated (I-A R. 73-86). Under the jurisdictional point it was

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[1] "I-A R." and "I-B R." references are to Volumes I-A and I-B of the record on appeal. "Tr." references are to the reporter's transcript of proceedings in the court below.

stated, *inter alia*, that virtually all of the allegedly seized material had already been returned to appellants and that as yet no indictment had been obtained and no decision had been made as to whether to seek an indictment. (I-A R. 70-72.)

Appellants filed notices to take the depositions of various Internal Revenue Service officers (I-B R. 137-142), but the District Court postponed the taking (I-B R. 146) and ultimately no depositions were taken. Two of the three agents in question testified in the District Court. (See *infra*.)

Appellants caused subpoenas to be served on Internal Revenue Service personnel (I-B R. 179-187, 259-266), calling for the production of all notes, memoranda, and reports of interviews with appellant Goodman and appellants' employees and of conferences or discussions between the investigating agents and their superiors concerning the investigation of appellants and of one James Pinkerton, and calling further for the production of Internal Revenue Service manuals concerning fraud investigations, all policy memoranda on the same subject, and the work diaries and work attendance records of Special Agent Nielsen and Internal Revenue Agent Loebig.

The disposition of these subpoenas is stated, *infra*, under a separate heading.

The District Court denied appellees' motion to dismiss the complaint. (I-B R. 188-189.)

Proceedings were held in the District Court on December 6, 15, and 16, 1965, and January 6, 1966, at which the testimony of appellant Goodman and the investigating agents and others was taken.

On February 8, 1966, the District Court filed findings of fact and conclusions of law (I-B R. 248-254) and entered judgment for the appellees dismissing the complaint (I-B R. 256).

Notice of appeal was filed on February 11, 1966. (I-A R. Index, p. 2, I-B R. 267.)

2. The District Court's findings of fact and conclusions of law

The District Court's findings of fact and conclusions of law (I-B R. 248-254) may be summarized as follows:

Paramount Ice Cream Corporation and Frigid Process Company are corporations. Neilsen and Stutz are Special Agents of the Intelligence Division of the Internal Revenue Service and Loebig is an Internal Revenue Agent of the Audit Division, Internal Revenue Service. In April, 1964, Neilsen and Stutz went to Paramount, introduced themselves to appellant Goodman as Special Agents with the Intelligence Division, United States Treasury Department, and explained the difference between a Special Agent and an Internal Revenue Agent. They told Goodman that they were investigating Pinkerton and Paramount and asked to see Paramount's books. Goodman gave them permission to examine any books they wished to see, and they examined the books of Paramount. Some books were taken, and the agents left a document receipt entitled "In Re Jim Pinkerton." (I-B R. 248-250.)

On December 18, 1964, in a continuing investigation of Pinkerton, Nielson returned to Paramount

with Loebig and, because Pinkerton had continued to have transactions with Paramount after 1962, asked Goodman for permission to see Paramount's books for the period subsequent to 1962. Nielsen had re-identified himself to Goodman and had introduced Loebig. Goodman instructed his bookkeeper to make available any books the agents wished to see. The agents microfilmed some books and took others, leaving a receipt entitled "In Re Jim Pinkerton." No personal questions were asked of Goodman and none of his personal records were requested. (I-B R. 250.)

After returning from Paramount on December 18, 1964, Nielsen was given a preliminary assignment on Goodman so as to interview him concerning his affairs. On December 21, 1964, Nielsen and Loebig re-identified themselves to Goodman and told him that his personal income tax returns were now being investigated. Goodman was told that he had a right against self-incrimination and a right to have an attorney present and that anything he said could be used against him. Goodman stated that he understood his rights, identified six personal income tax returns, and agreed to make available his personal cancelled checks, although he was informed that he was not obliged to do so. He agreed to make available the books of Frigid Process Company. Nielsen also obtained Goodman's permission to examine additional Paramount records as part of the Pinkerton-Paramount investigation. (I-B R. 251.)

On December 23, 1964, Goodman turned over to the agents, at Paramount, his personal cancelled checks,

for which a receipt was given entitled "In Re Jack Goodman." (I-B R. 252.)

On December 30, 1964, and January 4, 5, 6, and 7, 1965, Nielsen and Loebig were at the premises of Frigid Process Company in South Pasadena, examining Frigid's books. Goodman saw them there on several occasions and inquired as to whether everything was being made available. (I-B R. 252.)

In January 8, 1965, Nielsen and Loebig had an interview with Goodman, who was again informed of the privilege against self-incrimination and of his right to counsel. At this interview, Nielsen did not shout or promise leniency or accuse Goodman of lying. After the meeting, Goodman called attorney Alva Baird. (I-B R. 252.)

On January 11 and 12, 1965, Nielsen and Loebig continued to work at Frigid on the corporation's books and records, and on January 12 took some of Frigid's books, leaving a receipt entitled "In Re Jack Goodman and Frigid Process Co." (I-B R. 253.)

Attorney Baird agreed that the agents could keep and work on the books they had until January 25, 1965, and on that date some were returned and Baird gave them permission to continue working on the rest, which were returned subsequently. Baird made additional pesronal cancelled checks of Goodman available to the agents and cooperated with them as late as June, 1965 (I-B R. 253.)

No fraud, deceit, concealment, or misrepresentation was committed; permission to examine books and records was given voluntarily; no rights of appel-

lants under the Fourth, Fifth, and Sixth Amendments were violated. (I-B R. 253-254.)

3. The testimony of appellant Goodman

The testimony of appellant Goodman (Tr. 295-367) may be summarized as follows:

In April, 1964, when he first saw Nielsen and Stutz, Nielsen said that they were from the Internal Revenue Service, but no explanation was given of the difference between a Special Agent and an Internal Revenue Agent. (Tr. 297-298.) He gave the agents permission to examine the records of Paramount. (Tr. 299.) On December 18, 1964, he gave Nielsen and Loebig permission to examine the Paramount records from 1962 to the current date. He was not advised of any constitutional rights. (Tr. 301-302.)

On December 21, 1964, Nielsen and Loebig returned to Paramount and showed Goodman his personal joint income tax returns. Goodman identified the returns and agreed to produce his personal cancelled checks, which he kept at home. He did not ask why the agents wanted these checks, and they did not explain why they wanted him to identify his personal returns. He assumed that they were auditing Pinkerton and Paramount. They advised him of no constitutional rights. (Tr. 304-306.)

On December 23, 1964, the agents came to Paramount and Goodman gave them his personal cancelled checks. Nielsen did not tell him that he was under investigation or advise him of any constitutional rights or tell him that he was not obliged to produce the checks, nor did Nielsen ask for permission to see

the records of Frigid Process Company. (Tr. 308-309.)

During the first week of January, 1965, Goodman saw Nielsen and Loebig at Frigid, examining Frigid's books, but he had no conversation with them until Nielsen asked for a conference, which was arranged for January 8. On January 8, at Frigid, Nielsen questioned him about personal expenses allegedly charged to Frigid, shouted, accused Goodman of lying, told him that he was obliged to answer the questions, and never advised him of any constitutional rights. (Tr. 310-314, 319-320, 354.) Until that moment, he "had taken it for granted that they were investigating Mr. Pinkerton and Paramount Ice Cream Company." (Tr. 353.)

On December 23, 1964, when Goodman turned over his personal cancelled checks, Nielsen gave a documentary receipt for them to Goodman personally. (Tr. 340-341.)[2]

Goodman owns both Frigid and Paramount. He does not own all the stock of Paramount, but has an option to purchase it. (Tr. 320-321.) He owns all the stock of Frigid. (Tr. 324.) He is the president of both corporations. (Tr. 296.)

There was no discussion of his personal affairs or assets on December 21, 1964. (Tr. 335.)

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[2] This receipt is Plaintiff's Exhibit 4. (I-A R. 64, Tr. 78-79.) It states, *inter alia* (I-A R. 64): "Documents submitted in re: Jack Goodman." It is dated December 23, 1964. The receipt given on December 21, 1964, for records of Paramount stated (Pltf. Ex. 3, I-A R. 63): "Documents submitted in re: James Pinkerton."

Mr. Pinkerton had business relations with Paramount subsequent to 1962. (Tr. 363.)

Goodman never discussed with the agents whether the books of Frigid would be made available to them. (Tr. 363-364.)

Goodman engaged attorney Baird on January 12, 1965. (Tr. 362.)

Goodman was never at any time advised of his constitutional rights. (Tr. 319-320.)

4. The testimony of Special Agent Nielsen

Since the testimony of Special Agent Nielsen (Tr. 6-130, 368-386) was in substance the same as the District Court's findings of fact, we shall attempt to summarize it as briefly as possible. He testified in substance as follows:

In April, 1964, Nielsen was assigned to investigate the tax returns of James Pinkerton (Tr. 9.)[3] He first saw Pinkerton on April 7, 1964, identified himself and Stutz as Special Agents, and told Pinkerton that he was investigating Pinkerton's personal income tax returns. (Tr. 19-20.) Pinkerton stated that he had owned 100 percent of the stock of Paramount, and that the stock which he still owned was being held in escrow. (Tr. 23.) Later the same day Nielsen

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[3] Appellants' counsel stated "that Mr. Pinkerton's ownership of Paramount terminated in mid-'62." Nielsen testified that it did not terminate in 1962, as far as he knew, although Pinkerton had contracted on March 1, 1962, to sell his Paramount stock (evidently to Goodman). (Tr. 42.) After his visits to Paramount in April, 1964 (see *infra*), Nielsen discovered that Pinkerton had continued to have dealings with Paramount subsequent to 1962. (Tr. 43.)

and Stutz introduced themselves to the bookkeeper at Paramount (Ruth Myrshall) as Special Agents and told her that Pinkerton had said that he had no objection to their examining Paramount's records, but that they would not do so until they had Goodman's permission. (Tr. 21-23.)

The next day, April 8, 1964, Nielsen returned to the offices of Paramount with Stutz and introduced himself and Stutz to Goodman as Special Agents with the Intelligence Division, United States Treasury Department. Nielsen said that they were conducting an investigation of James Pinkerton and Paramount and would like to examine Paramount's books. Since Goodman asked, Nielsen explained that an Internal Revenue Agent conducts civil audits and that a Special Agent investigates violations of the internal revenue laws, and whether there has been any attempt to evade or defeat the payment of income taxes. Goodman granted the requested permission to examine Paramount's records. Nielsen did not advise Goodman of any constitutional rights, since Goodman was not under investigation and only corporate records were sought. (Tr. 23, 24, 28, 30.)

The agents examined Paramount's records on April 8, 9 and 21, 1964, and took some records for which they gave a receipt. The corporation's records were in two sets of volumes, one set running from July, 1962, to the then current date. Neilsen did not take these current volumes because he did not wish to cause inconvenience, but he left with the understanding that if he needed them he would return and microfilm them in place. (Tr. 31, 34, 40-41.)

On December 18, 1964, Nielsen returned to Paramount (this time with Loebig) in order to continue the Pinkerton-Paramount investigation, because he had learned since his last visit in April that Pinkerton had continued to have business transactions with Paramount, even after 1962. (Tr. 37, 43.) Nielsen re-identified himself to Goodman and introduced Loebig. (Tr. 37-38.) He told Goodman that Loebig had been assigned to work with him on the Pinkerton-Paramount investigation, and that they wanted to examine and microfilm Paramount's records for the period subsequent to 1962. Goodman stated that he had no objection. (Tr. 38-40.) Nielsen did not advise Goodman of any constitutional rights, because Goodman was not under investigation. (Tr. 62-63.)

Upon returning to his office that afternoon (December 18), Nielsen asked his superior for an assignment sheet in order to make a preliminary investigation of Goodman. (Tr. 53-54.) Accordingly, Nielsen was assigned to make a preliminary investigation to determine whether a full-scale investigation might be warranted. (Tr. 64.)

On December 21, 1964, Nielsen and Loebig returned to Paramount. Nielsen told Goodman that, while the investigation hitherto had been concerned with Pinkerton and Paramount, he had now been assigned to investigate Goodman's personal returns. (Tr. 66-68.) He advised Goodman of the privilege against self-incrimination and of the right to counsel. Goodman said that he had nothing to hide and that Nielsen could "Go ahead and question me." (Tr. 69.) Nielsen showed Goodman his personal returns, which Good-

man identified, and asked about Goodman's sources of income. Goodman said that he owned all the stock of Frigid Process Company, South Pasadena, and 52 percent of the stock of Frigid Process Company, Las Vegas. He said that the records were kept at South Pasadena and it was agreed that the agents could see them there on December 30. (Tr. 69, 73-74.) Nielsen also asked Goodman if he would produce his personal cancelled checks, telling Goodman that he was not obliged to produce them. Goodman agreed to do so. (Tr. 74-75.) When they left, the agents took some Paramount records (deposit tickets) for which they left a receipt entitled "In Re: Jim Pinkerton." (Tr. 70-71.) It was so designated because they took the records for the purposes of the Pinkerton investigation. (Tr. 71-72.)

On December 23, Goodman gave his personal cancelled checks to Nielsen, after again being advised that he was not obliged to do so. A document receipt was given, entitled "Documents submitted in re: Jack Goodman." (Tr. 75-79; Pltf. Ex. 4, I-A R. 64.)

On December 30, 1964, and January 4, 5, 6 and 7, 1965, Nielsen and Loebig were at the premises of Frigid, examining the corporate records. (Tr. 90-97.) Goodman saw them a number of times, and asked if everything was being made available. (Tr. 93-94, 97.) They did not then tell him that they were there to investigate his returns, because they had already told him that before. (Tr. 94-95.)

On January 8, 1965, Nielsen interviewed Goodman concerning his personal tax returns, after again ad-

vising him of the privilege against self-incrimination and telling him that he had the right to have an attorney present. Nielsen did not tell Goodman that he was suspected of a crime. The interview went on for about two hours. Nielsen did not shout or accuse Goodman of lying or promise leniency. As to a few questions, Goodman declined to answer, claiming privilege. He said that he would have to consult an attorney before he decided to give a sworn statement. (Tr. 98-112.)

The agents continued to microfilm Frigid's records on that day, after the interview, and on January 11 (a Monday) and January 12. On January 12, Goodman gave them permission to take certain corporate cancelled checks and bank statements which had not been microfilmed, and a document receipt was given. (Tr. 112-121, 125-126.) All the records taken were corporate records. (Tr. 127.)

On January 19, 1965, attorney Alva Baird agreed that the agents could keep the records until January 25, and later he allowed them to keep some for a longer time. Baird made available to them some of Goodman's personal cancelled checks which they had not seen before, and on June 10, 1965, permitted them to make a further examination of records at Frigid. (Tr. 385-386.)

5. The testimony of other witnesses

Four other witnesses testified before the District Court: Ruth Myshrall (Tr. 207-239), office manager of Paramount; Evelyn Gedatus (Tr. 246-294), office manager of Frigid; Special Agent Stutz (Tr. 402-

420); and Internal Revenue Agent Loebig (Tr. 421-465).

For the sake of brevity, and since the testimony of these witnesses was largely a repetition of parts of the testimony of appellant Goodman and of Special Agent Nielsen, we shall not summarize their testimony here.

6. The evidence concerning the return of the papers and records here involved

On the first day of the hearing in the District Court, the Assistant United States Attorney informed the court, without contradiction from appellants' counsel, that she had with her in court "the remaining original documents which would have been returned at any time counsel had asked for them." (Tr. 12.) On the last day of the hearing, appellants' counsel, in oral argument, appears to have conceded that all of the original records involved in this case had been returned to the appellants. (Tr. 472.)

7. The disposition of appellants' subpoenas calling for records of the Internal Revenue Service

With reference to appellants' subpoenas calling for the production of diaries, notes, reports, work schedules, manuals, etc., of the Internal Revenue Service (see Section 1, *supra*), the Assistant United States Attorney informed the court that there were "approximately two file cabinets full of this material." (Tr. 14.) She also stated that she had drawn up a list of all the dates mentioned in Special Agent Nielsen's diaries, involving visits to Paramount and talks with Goodman, including "excerpts from memoranda deal-

ing with this aspect of the case." She stated that she would gladly give this to appellants' counsel, but claimed that all other material called for by the subpoenas was both irrelevant and privileged, although she was willing to permit the court to examine it *in camera*. (Tr. 46.) Appellants' counsel explained why he wanted to see all the material called for by the subpoenas. (Tr. 47-49.) The court deferred any ruling. (Tr. 51.) Later, appellants' counsel again explained the purpose of the subpoenas (Tr. 130-131), and the Assistant United States Attorney offered to make available to appellants' counsel "the requisition forms" [4] and the assignment sheets (Tr. 133). Appellants' counsel explained that he wanted to know "when they sought to investigate Pinkerton and when they sought to investigate Goodman and what judgments had to be made and what the judgment was based upon." (Tr. 134.) The Government again offered to make everything available to the court. (Tr. 135.) Thereafter, the requisition forms and

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[4] Special Agent Nielsen testified (as already described, *supra*, under Section 4) that on December 18, 1964, he asked for a preliminary assignment sheet in order to investigate Goodman. (Tr. 53-54.) When asked why he decided to investigate Goodman, he explained that in November, 1964, he requisitioned Goodman's income tax returns to see if he had reported a commission which, according to Paramount's books, had been paid to him. (Tr. 55.) The purpose was to verify the payment for the Pinkerton-Paramount investigation, since many of Paramount's cancelled checks had been destroyed. (Tr. 56.) If he had discovered that Goodman had not reported the commission, he might then have decided to investigate Goodman (Tr. 57), but Goodman in fact had reported the commission (Tr. 61-62).

assignment sheets were produced and were admitted in evidence. (Tr. 390-391, 466.) The court finally denied the appellants' motions to take depositions and denied enforcement of the subpoenas. (Tr. 400-401.)

SUMMARY OF ARGUMENT

Although the complaint, alleging that agents of the Internal Revenue Service obtained books and records in violation of appellants' constitutional rights, requested that the evidence be suppressed and that the documents be returned, in fact most of the documents had been returned before this action was commenced, and it is undisputed that appellants could have obtained the rest (which were returned during the course of the proceedings below) merely by asking for them. In effect, therefore, the real purpose of this action is to obtain a ruling on the admissibility of evidence in criminal proceedings which, concededly, may never even be commenced. Therefore, the order dismissing the complaint was not a final, appealable order, and this appeal should be dismissed for lack of appellate jurisdiction.

In any event, the District Court correctly concluded that no records or papers were obtained in violation of appellants' constitutional rights.

Most of the records here involved were corporate records, voluntarily produced for the agents' examination. Appellant Goodman, a corporate officer, contends in effect that his consent was obtained by deceit, because the agents did not explain that a Special Agent investigates cases of possible fraud or crime,

because he was not advised of the privilege against self-incrimination or the right to counsel, and because at some point the investigation shifted, without his knowledge, to include him as its subject, rather than only a third person once connected with one of the corporations. It is, however, well established that, where evidence is voluntarily produced, there is no requirement that a Special Agent explain his particular function, nor is he required to warn of rights under the Fifth and Sixth Amendments. A fortiori, no such explanations or warnings are required in the case of corporate records, since they are not protected by the privilege against self-incrimination. As for the contention that appellant Goodman was led to believe that only a third person was under investigation, the District Court found it to be a fact that until a certain date the investigation was not concerned with Goodman, and it further found that when the investigation shifted to include Goodman, he was promptly informed of that shift.

The remaining records consisted of Goodman's personal cancelled checks, but the District Court found on ample evidence that Goodman voluntarily produced them after being told that his personal returns were to be examined, and after being advised of the privilege against self-incrimination and of his right to consult with counsel.

Finally, appellants contend that the District Court erred in quashing their subpoenas calling for the production of internal memoranda, reports, and diaries of the Internal Revenue Service. They assert, in effect, that the production of such material might

have aided them in proving that Goodman became the subject of investigation long before he turned over his personal checks, that no admonition of constitutional rights was ever given, and that from its inception the purpose of the investigation was to obtain evidence of crime or fraud. The subpoenas, however, were properly quashed, if for no other reason than that the evidence sought was wholly immaterial. Since the circumstances show a completely voluntary production of both corporate and personal records, no proof concerning warnings of constitutional rights or explanations of a Special Agent's role was required. Furthermore, it was immaterial when the agents may have decided to investigate Goodman's returns, since he could not have refused to produce the corporate records in any event, and as for his personal cancelled checks, the undisputed fact that the agents asked him to produce them and asked him to identify his own personal income tax returns put Goodman on notice that his returns, at that time, were under investigation, quite aside from the District Court's finding that the agents explained to Goodman that the investigation had been enlarged so as to include him.

ARGUMENT

I

This Action Should Have Been Dismissed as Premature, and for Other Reasons; Furthermore, the District Court's Order Is not Appealable

According to the complaint (I-A R. 5), the purpose of this action was to obtain the return of appellants' records, and copies thereof, and to suppress the use

of such records and copies, and evidence obtained directly or indirectly from them, in any criminal proceeding against appellants. It is, however, undisputed that most of the original records were returned before the action was brought, and evidently all other such records were returned while the hearing in the District Court was in progress, and would have been returned before the commencement of this action if appellants or their attorneys had asked for them. (Tr. 12, 472). It is also undisputed that this action was brought before indictment and before the initiation of any criminal proceedings whatever. Indeed, the Assistant United States Attorney stated in the District Court that the Government had not yet even decided that any criminal proceedings would ever be brought. (Tr. 50-51.)

In short, insofar as the question of appealability is concerned, this case is indistinguishable from *Hill* v. *United States*, 346 F. 2d 175, where this Court held that an order dismissing proceedings of the same kind as here involved is not appealable where, before appeal is taken, all records have been returned, so that the action no longer has any purpose except to obtain a ruling on the admissibility of evidence in a possible future criminal proceeding which may never even be commenced. See, also, *DiBella* v. *United States*, 369 U.S. 121, 131-132. Accordingly, we submit that this appeal is governed by *Hill* v. *United States*, *supra*, and that it should be dismissed for lack of appellate jurisdiction.

Furthermore, concerning the jurisdiction of the District Court to entertain this action, it may be in-

ferred from the opinion in *Hill* v. *United States, supra,* that—since the real purpose of this action was never to obtain the return of appellants' records or property, inasmuch as they could have had them for the asking—the District Court would not have abused its discretion if it had dismissed the complaint as prematurely brought, without considering at all the merits of the allegations concerning illegality in the Government's original acquisition of appellants' records, for this Court said in that case (p. 178):

> All that remains on this attempted appeal is the district court's order denying appellant's motion to suppress evidence. Since this attempt to suppress evidence has developed before any action has even been commenced, and, for that matter, has developed where an action may never even be commenced, we find this motion is nothing more than a premature request. If a criminal prosecution does subsequently take place, appellant can raise a motion to suppress any evidence which the government may have secured in violation of his constitutional rights.

A comparable case is *Gentilli* v. *Caplin,* decided by the United States Court of Appeals for the District of Columbia Circuit on March 3, 1964 (64-2 U.S.T.C., par. 9779). There,[5] the taxpayer filed a complaint, designated alternatively as a bill in equity or a motion under Rule 41(e) of the Federal Rules of Crim-

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[5] Since the District Court rendered no opinion (see 64-2 U.S.T.C., par. 9778, for the District Court's order), and the Court of Appeals failed to recite the facts, we refer to the original pleadings filed in the Court of Appeals.

inal Procedure, alleging the taking of records by agents of the Internal Revenue Service by unconstitutional search and seizure, and praying that the records and evidence be ordered suppressed for all purposes, including use in any criminal proceeding which might be brought and in any proceedings in the Tax Court. The action was brought against the Commissioner of Internal Revenue, the United States Attorney, and the Attorney General. The District Court granted defendants' motion for summary judgment (*Gentilli* v. *Caplin* (D.C. D.C.), decided November 26, 1962 (64-2 U.S.T.C., par. 9778)), and the Court of Appeals affirmed in a *per curiam* opinion (64-2 U.S.T.C., par. 9779) as follows (omitting the formal introductory sentence):

> On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this case be, and it is hereby, affirmed without prejudice, however, to appellant's urging his objections to the use by the government of the documents in suit in some subsequent appropriate proceeding. See *Reisman* v. *Caplin*, 375 U.S. 440 (1964).

Since *Reisman* v. *Caplin*, 375 U.S. 440, involved an action by a taxpayer to quash an Internal Revenue summons for the production of books and records, but the *Gentilli* case was an action to suppress evidence which the Government already had, the reference in the *Gentilli* opinion quite evidently was to the basic proposition adopted in *Reisman* v. *Caplin*, *supra*, p. 443, *viz.*, that the complaint (in *Reisman*) was properly dismissed, not necessarily for the reasons adopted

by the District Court, but because the taxpayer had an adequate remedy at law. That remedy was that, if and when the Government should bring an action to enforce the summons, the taxpayer could intervene and oppose the action and, if unsuccessful, could appeal. In *Gentilli* v. *Caplin*, as in the instant case, the Internal Revenue Service already had the evidence sought to be suppressed, but no extraordinary equitable remedy in advance of any attempt to use the evidence is required, since the complaining taxpayer already has an adequate remedy at law, i.e., he may wait until the Government seeks to use the evidence in a criminal or civil case in the district court or in a Tax Court proceeding and may then make appropriate objection or move to exclude the evidence, and may appeal from any final, adverse decision in the case.

In sum, we submit that the District Court could well have dismissed the present action on the ground that it was prematurely brought, and that, in any event, this appeal should be dismissed, as in the case of *Hill* v. *United States*, *supra*, for lack of a final, appealable order.[6]

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[6] It may at least be noted that, since appellants asked for the return of all *copies* which the appellees might have, such relief should in any event be denied as requiring a premature intervention by the courts in the process of tax assessment and collection. See *Zamaroni* v. *Philpott*, 346 F. 2d 365 (C.A. 7th); cf. *Kennedy* v. *Coyle*, 352 F. 2d 867 (C.A. 7th).

II

On Factual Findings Fully Supported by the Evidence, the District Court Correctly Concluded That Appellants Suffered no Violation of Constitutional Rights

In the event that this appeal is not dismissed for lack of jurisdiction (see Part I, *supra*), we turn now to the merits of the case.

A cardinal fact in this case is that a great part of the evidence which appellants seek to suppress consists of *corporate records*. Between April 8, 1964, when the first examination of any records took place (I-B R. 249-250; Tr. 23-24), and January 12, 1965, when Goodman retained attorney Alva Baird (I-B R. 253; Tr. 362), the agents (with Goodman's consent) examined, copied, and in some instances took with them only the corporate records of Paramount and Frigid (see Statement, *supra*), with one exception. The exception occurred on December 23, 1964, when Goodman turned over to the agents his personal cancelled checks. (I-B R. 252; Tr. 75-79, 308-309.) After January 12, 1965, attorney Alva Baird made available to the agents some of Goodman's personal cancelled checks which they had not seen before. (I-B R. 253; Tr. 385-386.)

There is obviously a considerable difference between personal papers and corporate records with respect to constitutional immunities; we shall consider the two categories separately.

A. *The corporate records*

Our chief purpose will be to consider the corporate records in the light of the District Court's findings

of fact, but we shall also consider (since appellants complain (Br. 14-21) of the failure to enforce their subpoenas) whether the result would be any different if appellants' alleged suspicions (e.g., Br. 21-24) and Goodman's testimony (Tr. 295-367) were accepted as correct.

At the outset, it may be noted that the District Court's findings of fact (I-B R. 248-254) were fully supported by the testimony of all the agents who actually participated in the examination, copying and taking of records (Tr. 6-130, 368-386, 402-420, 421-465.) See the Statement, *supra*. Appellants contend (Br. 25-42) that the court's findings were clearly erroneous, but in effect they seek nothing less than a trial de novo, contrary to the rules governing appellate review. See, e.g., *Baumgardner* v. *Commissioner*, 251 F. 2d 311, 313 (C.A. 9th); *United States* v. *Gypsum Co.*, 333 U.S. 364, 395. Clearly, it was within the province of the District Court to judge as to which witnesses were telling the truth; and we submit that on the record in this case Goodman's testimony is, to say the least, difficult to believe. One example may suffice. Goodman testified that on December 21, 1964, Nielsen and Loebig returned to Paramount, showed him the personal joint income tax returns filed by him and his wife, asked him to identify the returns, and asked him to produce for examination his personal cancelled checks. Yet he testified that he did not ask them why, in the circumstances, they wanted to see the checks, that they did not explain why they wanted him to identify the returns, and that he assumed that they were merely pursuing

their audit of Pinkerton and Paramount. (Tr. 304-306.) His testimony was to the same effect with reference to December 23, when he actually delivered his checks to them. (Tr. 308-309.) This testimony would seem inherently incredible. Nielsen's testimony was entirely to the contrary, including his testimony that on December 21 he explained to Goodman that he had now been assigned to investigate Goodman's personal returns. (Tr. 66-68.)

We turn now to the District Court's findings. It found, *inter alia*, that on April 8, 1964, Nielsen informed Goodman that he and Stutz were investigating Pinkerton and Paramount, and that with Goodman's permission they examined *the corporation's records* on April 8, 9, and 21, and on April 21 took some of the records with them, leaving a receipt. (I-B R. 249-250.) Goodman agreed with these findings (Tr. 297-300), and his only cavil now is that he allegedly thought that the agents were merely conducting an audit, that he did not know the role of a Special Agent, and that he was not advised of any constitutional rights (e.g., Br. 24, 50). Nielsen agreed that he gave no warning of constitutional rights, but testified that he explained the difference between an Internal Revenue Agent and a Special Agent. (Tr. 24-30.) On either of these versions of the events of April, 1964, obviously no violation of anyone's constitutional rights occurred. Neither a corporation nor its officer in possession of its records may refuse to produce the records of the corporation, whether such records may incriminate the corporation or the officer or both. See, e.g., *Wilson* v. *United States*, 221 U.S. 361; *Wheeler*

v. *United States*, 226 U.S. 478; *United States* v. *White*, 322 U.S. 694.

Since neither Goodman nor the corporation had any right to prevent the examination of the corporate records, obviously there was no occasion to warn Goodman of his *personal* privilege against self-incrimination or right to counsel. A warning of the latter right was adopted as a rigid requirement in *Miranda* v. *Arizona*, 384 U.S. 436, but only as a means of fortifying the free choice envisaged by the self-incrimination privilege (in situations where an accused person —i.e., one whom the police are seeking to incriminate —is subjected to the pressures of an in-custody interrogation.) Here, there was no self-incrimination privilege to be thus fortified or supplemented; furthermore, Goodman was not under arrest and was not an accused person. Cf. *Kohatsu* v. *United States*, 351 F. 2d 898 (C.A. 9th), certiorari denied, June 20, 1966 (34 U.S. Law Week 3429). Indeed, Goodman was not even under investigation, according to the District Court's findings and the agents' testimony, and appellants do not seriously contend otherwise. But even if the opposite were supposed, neither Goodman nor the corporation (Paramount) suffered any loss of rights, since neither had any right to withhold the corporate records from the agents' examination.

After the events of April, 1964, no records of any kind were seen until December 18, 1964. (I-B R. 250; Tr. 37, 43-44.) On that day the agents returned for a further examination of Paramount's records, because they had discovered that Pinkerton had continued to do business with Paramount even after 1962,

although Goodman apparently had held the dominant or active role in the corporation since March, 1962. (I-B R. 250; Tr. 37-43, 320-324, 363.) For the reason stated, current or post-1962 corporate records were examined and taken, with Goodman's permission. (I-B R. 250; Tr. 40, 44.) On these facts, for the same reasons as stated above, no warnings of constitutional rights were required, since only corporate records were examined or taken. True, Goodman strongly voices his suspicion that the agents already had their eyes on him (Br. 32), but, if so, the fact is immaterial. A corporate officer has no right to withhold corporate records relevant to a lawful federal tax investigation, no matter who ultimately may be incriminated. See, e.g., *Wilson* v. *United States*, *supra*.

On December 21, 1964, the agents took more of Paramount's books, with Goodman's permission. (I-B R. 251.) The situation was not different from that of December 18, except that on December 21 the agents also inquired into Goodman's personal tax liabilities and asked to see his personal cancelled checks (matters to be discussed separately, *infra*).

Next, the corporate records of Frigid were examined on December 30, 1964, and on January 4, 5, 6, 7, 8, 11, and 12, 1965. (I-B R. 252-253.) Goodman testified that no warnings of constitutional rights were given at any time, and that only on January 8 did he at last learn, during a stormy interview, that he had become the target of the investigation. (Tr. 310-314, 319-320, 354.) Yet according to his own testimony he was the president and sole stockholder of

Frigid (Tr. 296, 324), and the record shows no interest of Pinkerton in that corporation at any time.

Clearly, for the reasons already stated, no constitutional rights were violated since only corporate records were involved. Appellants cite (Br. 21, 24) *Gouled* v. *United States*, 255 U.S. 298, where evidence was suppressed because the complainant was deceived into admitting to his premises an old friend, not known by him to be now a Government agent, and the ostensible friend then secretly removed the complainant's private (not corporate) papers. But in the instant case, if Goodman thought that Nielsen and Loebig were investigating only Pinkerton (an incredible supposition), his misapprehension was of no moment, since neither he nor the corporation had any right to prevent the examination, no matter who might be incriminated. To be sure, a corporation need not submit to an unconsented breaking and entering into its premises and the rifling of its records. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385. But we submit that Government agents who identify themselves as such and examine corporate records with permission obviously commit no unreasonable search and seizure, even if a corporate officer may later and irrelevantly claim that he thought that an examination of his wholly owned corporation was solely in furtherance of an investigation of some other person wholly unconnected with the corporation. If Goodman thought any such thing, the agents certainly were entitled to assume otherwise. If the ownership status of Frigid did not clinch the point, the record also contains the receipt given on

December 23, 1964, for Goodman's personal cancelled checks, bearing the words "Documents submitted in re: Jack Goodman." (Pltf. Ex. 4, I-A R. 64; Tr. 78-79.) This receipt was handed to Goodman personally on December 23, 1964, as Goodman himself admitted. (Tr. 340-341.)

Goodman also contends that he was deceived because he was never told that the investigation was a "criminal investigation." (Br. 22.) However, even where oral admissions or personal records (as to which the self-incrimination privilege can be invoked) are obtained by a Special Agent during a tax investigation, absent elements of fraud and deception the agent is not required to warn the taxpayer that he is investigating the possibility of criminal fraud; nor is he required to warn the taxpayer that his statements or documents can be used against him in a criminal case; the oral admissions and personal records are usable for all subsequent tax purposes (civil and criminal) if, in fact, the admissions were voluntarily made and the records voluntarily delivered to an identified investigating agent of the internal Revenue Service. *Kohatsu* v. *United States*, *supra; Greene* v. *United States*, 296 F. 2d 841, 843 (C.A. 2d), vacated and remanded on other grounds, 369 U.S. 403; *Montgomery* v. *United States*, 203 F. 2d 887, 893 (C.A. 5th); *United States* v. *Burdick*, 214 F. 2d 768, 773-774 (C.A. 3d), vacated and remanded, 348 U.S. 905, affirmed on remand, 221 F. 2d 932, certiorari denied, 350 U.S. 831; *United States* v. *Sclafani*, 265 F. 2d 408, 414-415 (C.A. 2d), certiorari denied, 360 U.S. 918; *Turner* v. *United States*, 222 F. 2d 926, 931-

932 (C.A. 4th), certiorari denied, 350 U.S. 831. See also (although not involving Special Agents) *Hanson* v. *United States*, 186 F. 2d 61, 64-66 (C.A. 8th), and *Scanlon* v. *United States*, 223 F. 2d 382, 384-385 (C.A. 1st).

A fortiori, insofar as the corporate records of Paramount and Frigid are concerned, the agents were not required to advise Goodman that a criminal investigation or fraud investigation was underway, since neither he nor the corporations had any right to refuse to produce those records, regardless of who might be incriminated.

In short, no violation of any constitutional rights occurred with respect to the examining, copying, or taking of the *corporate* records of Paramount and Frigid, in light of the findings of fact made by the District Court; and the conclusion must be the same even if Goodman's version of events is taken as correct.

B. *Goodman's private papers*

Nothing remains to be considered except Goodman's delivery of his personal cancelled checks to the agents on December 23, 1964. (I-B R. 252.) The District Court found (I-B R. 251-252), in accordance with Nielsen's testimony (Tr. 53-79), that after returning from Paramount on December 18, 1964, Nielsen was given a preliminary assignment to investigate Goodman, and that on December 21, Nielsen (after identifying himself by his title and showing his commission) told Goodman that now his personal income tax returns were under investigation and advised Good-

man of the privilege against self-incrimination and the right to have an attorney present. Goodman stated that he understood his rights and identified six personal income tax returns. He agreed to make his personal cancelled checks available, after being told that he was not obliged to do so. On December 23, 1964, Goodman delivered the checks to the agents at Paramount and received a receipt made out "In Re Jack Goodman." On the basis of the foregoing findings of fact, obviously no constitutional rights were violated. Being fully advised of his rights, and with two days in which to decide whether to consult an attorney, Goodman voluntarily handed over his checks. Since the court's findings were fully supported by competent evidence, there should be no need to dwell now upon the different set of facts alleged by Goodman, except for his contentions that the findings are clearly erroneous (Br. 25-42) and that the case should be remanded for the enforcement of his subpoenas (Br. 14-21).[7]

Appellants' contentions are, in substance, that on December 21 and December 23, 1964, he still believed that the agents were investigating only Pinkerton, or Pinkerton and Paramount; that the agents never informed him to the contrary until January 8, 1965; that, furthermore, he did not know what the functions of a special Agent were, or that fraud or crime was the subject of the investigation; and that he was never at any time advised of the privilege

[7] We discuss the matter of the subpoenas under Part III, *infra*.

against self-incrimination or the right to counsel. He also contends (Br. 32) that Nielsen had decided to investigate him as early as November, 1964. Otherwise stated, the contentions are that evidence derived from Goodman's personal cancelled checks should be suppressed (1) because he was deceived into believing that only Pinkerton was under investigation, with the result that there was a taking without his consent and hence an unreasonable search and seizure; (2) because he was not informed that the possibility of fraud or crime was under investigation, with the same result just stated; and (3) because he was not warned of the privilege against self-incrimination or the right to counsel.

As for the first contention, the answer is that the District Court found that Goodman was told on December 21 that he was then under investigation, during the same meeting when he was asked to produce the checks. (I-B R. 251.) Furthermore, as previously submitted, *supra*, Goodman's contrary testimony is, on its face, incredible. Admittedly, on December 21 Nielsen (for the first time) showed Goodman his personal income tax returns and asked him to identify them, and then asked whether Goodman would permit him to examine his personal cancelled checks. No claim is made that only certain checks were asked for, which might somehow pertain to Pinkerton. Under these circumstances, it is hardly likely that Goodman could have supposed that Pinkerton alone was the subject of the agents' investigation, even if it were assumed that Nielsen said nothing about any purpose to examine into the correctness of Goodman's returns.

Furthermore, even if it were assumed, arguendo, that Goodman did imagine that the agents were not interested in him or his returns, Nielsen could have been in no position to realize that Goodman had any such belief, since the mere act of showing Goodman his returns and asking for his personal cancelled checks would seem to be sufficient to inform any ordinary taxpayer that *his* tax returns and his tax liabilities were under scrutiny. The short of the matter, however, is that it is difficult to see how Nielsen could have inquired for the first time into Goodman's personal returns and checks without making some explanation, and certainly the District Court was fully justified in rejecting Goodman's testimony (Tr. 304-306) that he (Goodman) asked no questions and that no explanation was given.

The second contention is that Goodman was not informed that the possibility of fraud or crime was under investigation. As already shown (under Part A, *supra*), it is well established that a Special Agent is not required to give any such explicit advice, it being sufficient if the taxpayer's giving of statements or the production of documents is entirely voluntary. There is no deception and no resulting absence of consent, although the role of a Special Agent is not explained, because any ordinary taxpayer undoubtedly realizes that tax investigators will explore or take note of every aspect of his returns, and surely will inquire into the reason for false deductions or unreported income and into the question of whether the discrepancies were willful or merely inadvertent.

That is the rationale of the cases previously cited. See, e.g., *Kohatsu* v. *United States, supra; United States* v. *Sclafani, supra.*

The third contention is that Goodman was not advised of the privilege against self-incrimination or of the right to counsel. The District Court found, however, that he was advised of both rights on December 21, when he agreed that he would make his personal cancelled checks available. (I-B R. 251.) Furthermore, there would have been no unreasonable search and seizure, and hence no right to suppress,[8] even if the facts were assumed to be otherwise. In *Kohatsu* v. *United States, supra,* the same contention was made (see 351 F. 2d p. 899), but this Court held that the taxpayer's documents were admissible at the taxpayer's trial for tax evasion even though the agents (including a Special Agent) had obtained them from the taxpayer without advising him of the privilege against self-incrimination or the right to counsel. This Court, distinguishing *Escobedo* v. *Illinois*, 378 U.S. 478, noted (p. 901) that in *Kohatsu* the accusatorial stage had not been reached, since the agents (as in any tax investigation) were not seeking to identify a person in custody as the perpetrator of an unsolved crime, but were investigating to determine "whether in fact any crime had been

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[8] Rule 41(e) of the Federal Rules of Criminal Procedure, *supra* is based upon violations of the Fourth Amendment right. See, also, *Centracchio* v. *Garrity,* 198 F. 2d 382 (C.A. 1st), certiorari denied, 344 U.S. 866; *Biggs* v. *United States,* 246 F. 2d 40 (C.A. 6th), certiorari denied, 355 U.S. 922; cf. *In re Fried,* 161 F. 2d 453 (C.A. 2d).

committed." In the instant case, obviously Special Agent Nielsen was engaged in the same task. Indeed, he was merely commencing his investigation of Goodman, since he never obtained any of Goodman's personal records (the personal cancelled checks) until December 23 (I-B R. 252), and even on December 18 he had been given only a preliminary assignment to investigate to see whether a full investigation of Goodman might be warranted (Tr. 53-54, 64).

In short, this third contention, like the second, is entirely governed by *Kohatsu*. Furthermore, in *Miranda* v. *Arizona*, *supra*, the Supreme Court said nothing which would tend to support a contrary result. The entire thrust of *Miranda* was directed toward confessions and admissions which are not truly voluntary because made by a person in custody or under some kind of restraint. As the Court said (384 U.S., p. 478), "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." In the instant case, Goodman's production of his personal cancelled checks was completely voluntary, even on the basis of his own testimony (except for his claim of deceit, already dealt with, *supra*). He was asked for his checks on December 21, and on December 23 he turned them over to the agents at his office. (I-B R. 251-252.) He was entirely free to see an attorney, or to delay as long as he liked in the matter of finding or delivering the checks. It is significant, in this regard, that even after Goodman had retained counsel, the latter made additional personal cancelled checks

available to the agents and cooperated with them as late as June, 1965.

In sum, there was no violation of constitutional rights with respect to *any* of the records, papers, checks, or other documents involved in this case.

III

The District Court Did Not Err in Denying Enforcement of Appellants' Subpoenas

Appellants contend (Br. 14-21) that the District Court erred in granting appellees' motion to quash appellants' subpoenas duces tecum. These subpoenas called for the production of all notes, memoranda, and reports of interviews with appellant Goodman and appellants' employees and of conferences or discussions between the investigating agents and their superiors concerning the investigation of appellants and of Pinkerton, the work diaries and work attendance records of Special Agent Nielsen and Internal Revenue Agent Loebig, and Internal Revenue Service policy memoranda and internal manuals concerning fraud investigations. (I-B R. 178-187, 259-266.) Appellants contend (Br. 16-18) that the production of this material would have aided them in showing (1) that no admonition of constitutional rights was given; (2) the exact time when the investigation first included Goodman; (3) that the investigation was a criminal investigation from its inception and "was never concerned with anyone's civil tax liabilities" (Br. 17); and (4)—actually a point subsidiary to (2), *supra*—"that the case assignment sheet (dated December 18, 1964) (Exhibit 8) was actually pre-

pared prior to the interview of Mr. Goodman on this day" (Br. 18).

Clearly, the District Court did not err in quashing the subpoenas, because it was completely unreasonable to expect that the proposed fishing expedition would produce any relevant evidence. We turn to examine appellants' alleged purposes. (Br. 16-18.)

First, they seek to justify the subpoenas by saying that the memoranda, reports, diaries, etc., might aid them in proving that no admonition of constitutional rights was given. (Br. 16.) We have already shown, however, that no such admonition was required, even as to Goodman's personal cancelled checks, since his delivery of the checks, on the undisputed facts, was completely voluntary.

Secondly, appellants contend that the material sought by the subpoenas would show that Goodman "was the subject of a criminal investigation prior to December 21, 1964" (Br. 17), indeed, prior to December 18, 1964 (Br. 18). But even if that were shown, the fact would be immaterial. No matter when Goodman came under investigation with respect to the possibility of his having perpetrated fraud or having committed crime, nothing which he could have withheld was obtained by the agents until December 23, when he turned over his personal cancelled checks. As to whether he was then the subject of a special agent's investigation, there is no dispute.

Thirdly, appellants contend that the subpoenas, if honored, would show "that this investigation * * * was a criminal investigation from its inception and was never concerned with anyone's civil tax liabili-

ties." (Br. 17.) But it may be conceded that, like any special agent, Nielsen was concerned with the *possibility* that fraud and even criminal activity, first with respect to Pinkerton and then with respect to Goodman, might ultimately be disclosed. The agents here were identified from the outset; their duties require no redundant proof. See *Kohatsu* v. *United States*, *supra; Boren* v. *Tucker*, 239 F. 2d 767 (C.A. 9th); *United States* v. *Lipshitz*, 132 F. Supp. 519, 521 (E.D. N.Y.); Notice, Treasury Department, Internal Revenue Service—Organization and Functions, Sec. 1118.6 (26 Fed. Register, Part 7, pp. 6372, 6393). The imposition of civil fraud penalties and the establishment of criminal liability as ultimate theoretical possibilities of course require investigation into true basic tax liability.

To require, in the circumstances of this case, the enforcement of the subpoenas here involved in effect would permit appellants, by merely voicing suspicions [9] when no criminal proceedings are pending, to obtain more than the recently liberalized Federal Rules of Criminal Procedure allow a defendant under indictment to obtain by way of discovery. Rule 16(b) of those rules, as amended, effective July 1, 1966, provides that the discovery permitted by that rule, except for reports of medical or scientific examinations—

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[9] Compare *Lawn* v. *United States*, 355 U.S. 339, where the Court held that the trial court in a criminal case was not required to conduct a full-dress hearing based on the defendants' suspicion that evidence obtained in violation of constitutional rights had been presented to the grand jury.

does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500.

CONCLUSION

For the foregoing reasons, either this appeal should be dismissed or the order of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of August, 1966.

JOHN M. BRANT, Attorney